

TCEQ DOCKET NO. 2007-0599-MSW

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IN THE MATTER OF THE  
MOTION TO OVERTURN THE  
EXECUTIVE DIRECTOR'S  
TEMPORARY AUTHORIZATION  
FOR USE OF NEWPARK RESOURCES,  
INC.'S MATERIAL AS ALTERNATIVE  
DAILY COVER AT THE PORT ARTHUR  
LANDFILL

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BEFORE THE TEXAS  
COMMISSION ON CHIEF CLERKS OFFICE  
ENVIRONMENTAL  
QUALITY

**NEWPARK RESOURCES, INC.'S BRIEF IN RESPONSE  
TO MOTION TO OVERTURN TEMPORARY AUTHORIZATION**

NEWPARK RESOURCES, INC. ("Newpark"), a commercial oil and gas waste management company authorized by the Railroad Commission of Texas ("RRC") to receive and treat non-hazardous oil and gas waste pursuant to RRC Stationary Treatment Facility Permit No. STF-001, files this Brief in Response to the Motion to Overturn the Temporary Authorization for Use of Newpark's Alternative Daily Cover Material at the Port Arthur Landfill filed by the Texas Campaign for the Environment ("TCE") and Community In-Power Development Association, Inc. ("CIDA"), as an interested party, and would show the Commissioners of the Texas Commission on Environmental Quality ("TCEQ") the following:

**I. Introduction**

The City of Port Arthur ("City") operates a municipal solid waste landfill facility located in Jefferson County pursuant to Municipal Solid Waste Permit No. 1815A issued by the TCEQ. On June 29, 2007, the City filed a Request for Temporary Authorization ("TA") with the TCEQ for the use of Newpark's treated material as alternative daily cover ("ADC") at its landfill. On October 8, 2007, the City responded to the TCEQ's Notice of Deficiency, and supplemented its Request with additional information. Newpark assisted the City in the application process by providing an abundance of historical and current technical information concerning its treated material, and the suitability of its use as landfill cover. This information included a detailed description of Newpark's treated material, the results of 67 months of analyses of Newpark's treated material, and the TCEQ Toxicology Division's letter dated April 4, 2006 confirming that its own risk-based review "did not identify any specific human-health concerns regarding the use of the treated Newpark material as ADC at MSW landfills."

On November 28, 2007, the TCEQ Executive Director issued a TA to the City. In accordance with 30 T.A.C. §330.165(d)(4)(B), the TA authorized the use of Newpark's treated material as ADC at the City's landfill even though it contains total petroleum hydrocarbons ("TPH") in concentrations greater than 1,500 milligrams per kilogram (mg/kg). The TA expressly states, "The material is hereby approved to be used on a temporary-trial basis only." The TA subjects the use of Newpark's ADC material to

seven conditions that must be satisfied during the 180-day timeframe in which the TA is effective.

TCE and CIDA subsequently filed a Motion to Overturn the City's TA. TCE and CIDA complain that the Executive Director "acted in *direct contravention* of the Commission's rules and issued [the TA]," which "does not include the limitations now included in 30 T.A.C. §330.165.<sup>1</sup> The Public Interest Counsel of the TCEQ ("PIC") submitted a Response to the Motion to Overturn arguing that Newpark's treated material is Class 1 non-hazardous industrial solid waste and therefore cannot be used as ADC at the City's landfill.

As discussed below, the City has met all applicable standards for issuance of a TA authorizing the use of Newpark's treated material as ADC at its landfill.

## **II. Newpark's Treated Material Used As ADC**

Since 1987, Newpark has provided over 2,000,000 cubic yards of its treated material to municipal solid waste landfills, including the City's landfill, for use as ADC.<sup>2</sup> Newpark's treated ADC product is naturally occurring *non-hazardous* oil and gas waste stabilized with Class C fly ash. The oil and gas waste portion of the ADC material primarily consists of reclaimed drilling fluids and drilled solids from offshore oil and gas exploration in the Gulf of Mexico.<sup>3</sup> The receipt and treatment of non-hazardous oil and gas waste is exclusively regulated by the RRC.<sup>4</sup>

Newpark has routinely characterized the chemical and physical properties of its ADC material in accordance with its permits and authorizations. In fact, Newpark's ADC

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<sup>1</sup> Motion to Overturn dated December 21, 2007, pg. 2-3. (Emphasis added).

<sup>2</sup> In 1987, the RRC issued Permit No. STF-001 to Newpark. On February 13, 1987, the Texas Department of Health ("TDH") authorized the City to use Newpark's treated material as ADC at its landfills. In 1993, jurisdiction over solid waste landfills transferred from the TDH to the Texas Natural Resource Conservation Commission (now the TCEQ). On January 28, 1994, TCEQ authorized the City to use Newpark's treated material as ADC at its landfills.

<sup>3</sup> RRC Permit No. STF-001 specifically authorizes Newpark to receive certain types of non-hazardous oil and gas waste. The RRC permit further requires it to treat all waste received through a specific treatment process. Newpark employs physical processing to separate the non-hazardous oil and gas waste stream into its liquid and solid components. Newpark utilizes underground injection technology to dispose of the non-hazardous oil and gas liquids, and utilizes chemical fixation with fly ash to treat residual solids for reuse applications.

<sup>4</sup> Permit No. STF-001 authorizes the reuse of Newpark's treated material as daily cover at a solid waste facility permitted by the TCEQ provided that the benzene level does not exceed 0.5 mg/l in the TCLP extract, and provided that Newpark obtains written concurrence from the solid waste facility operator that would use Newpark's treated material as ADC and the permitting agency for that facility, which is the TCEQ. Such requirements in Permit No. STF-001 are based on the Memorandum of Understanding between TCEQ and RRC, which states, "Waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ if: (1) RRC specifically authorizes the management of wastes under its jurisdiction at a TCEQ-regulated facility (by rule, permit, or other written authorization); and (2) the TCEQ concurs with the waste management plan. See 16 T.A.C. §3.30(f)(3).

material has been recently subjected to extensive extraction and laboratory analyses. Results conclusively document that the ADC material is not toxic and does not leach chemicals at harmful levels in a landfill environment.

### **III. Newpark's Treated Material Is Not Class 1 Waste**

The PIC argues that Newpark's treated material is a Class 1 waste. However, PIC's argument is inconsistent with applicable TCEQ regulations.

Newpark's treated material is a recycled, reusable product, not a raw "solid waste." Likewise, the treated material is not waste generated by an industrial activity. By letter dated November 17, 1993, the Texas Natural Resource Conservation Commission (now the TCEQ) expressly recognized, "After review of the regulations, we have determined that the [Newpark] material is exempt from the definition of solid waste because it results from activities associated with the exploration, development or production of oil or gas resources regulated by the Railroad Commission of Texas."<sup>5</sup> Because it is not classified as "solid waste," Newpark's treated material is not subject to 30 T.A.C. Chapter 335, which governs Class 1 waste.

Class 1 waste is the most rigorously regulated category of industrial solid waste because it poses a threat to human health and the environment. Newpark's material has been thoroughly treated and has a final, stable composition that does not pose a danger to human health or the environment. In addition, although Newpark's treated material is a product and not waste, the "make-up" of the material is similar to specific types of wastes that were excluded from the definition of "petroleum substance" in Chapter 335 and, as a result, are not subject to the restrictions and limitations imposed on Class 1 waste. By definition, "petroleum substance" does not include polymerized materials (i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene), animal, microbial, and vegetable fats, food grade oils, hardened asphalt and solid asphaltic materials (i.e., roofing shingles, roofing felt, hot mix and cold mix), and cosmetics.<sup>6</sup> TCEQ excluded the above materials from the definition of "petroleum substance" because the materials are stable wastes that do not pose a threat when TPH concentrations exceed 1,500 mg/kg.<sup>7</sup>

Newpark's treated material at issue in this matter is not Class 1 industrial solid waste.

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<sup>5</sup> (Emphasis added). The TNRCC Letter dated November 17, 1993 is attached as **Exhibit A**. See 30 T.A.C. §300.3(145), which sets forth the current definition of "solid waste" as excluding "waste materials that result from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101."

<sup>6</sup> See 30 T.A.C. §335.1(109).

<sup>7</sup> TCEQ's intentions for excluding stable wastes from the definition of "petroleum substance" are published at 20 TEX. REG. 3722 (May 19, 1995).

#### **IV. TCEQ Rule 330.165(d)**

In 2006, TCEQ revised its municipal solid waste rules, including the specific provisions addressing ADC at 30 T.A.C. §330.165(d). During the Chapter 330 rulemaking process, the City and Newpark played major roles in the implementation of the new ADC rule by providing substantial public comments on the proposed standards and limitations for use of ADC materials at landfills. In accordance with the City and Newpark's comments, the TCEQ adopted 30 T.A.C. §330.165(d)(4)(B), which allows a landfill operator the opportunity to demonstrate for Executive Director approval that material to be used as ADC is protective of human health and the environment, and therefore can be suitable as ADC, even though the material contains Total Petroleum Hydrocarbons ("TPH") exceeding 1,500 milligrams per kilogram (mg/kg).<sup>8</sup>

Contrary to the statements set forth in the Motion to Overturn filed by TCE and CIDA, current TCEQ regulations *expressly* authorize the Executive Director to conduct a specific review of Newpark's treated material to consider factors such as the material's risk to human health and environment, and the results of laboratory analyses and laboratory quality assurance/quality control information, to determine whether the use of the material as ADC is appropriate even though it contains TPH concentrations in excess of 1,500 mg/kg.

#### **V. Application of TCEQ Rule 330.165(d) to City's Request for Temporary Authorization**

The City has satisfied all applicable requirements in 30 T.A.C. §330.165(d) for issuance of a TA authorizing the use of Newpark's treated material as ADC at its landfill.

Pursuant to Subsection 330.165(d)(4)(B), the City adequately demonstrated to the Executive Director that Newpark's treated material is a suitable ADC even though TPH concentrations exceed 1,500 mg/kg. Such demonstration included an abundance of information regarding the material's effect on human health and the environment.<sup>9</sup> Additionally, the City submitted a detailed ADC operating plan with its Request for TA, which included: a description and minimum thickness of the Newpark's treated material to be used; its effect on vectors, fires, odors, and windblown litter and waste; the application and operational methods to be utilized at the landfill when using Newpark's treated material; a chemical analysis of the material; and extensive information concerning the characteristics, features, and other factors related to the use of Newpark's treated material as ADC.<sup>10</sup> Further, the City provided information demonstrating that Newpark's treated material does not contain constituents of concern exceeding the concentrations listed in Table 1, Constituents of Concern and Their Maximum Leachable Concentrations, located in 30 T.A.C. §335.521(a)(1),<sup>11</sup> and does not contain

<sup>8</sup> 31 Tex. Reg. 2502 (March 24, 2006).

<sup>9</sup> 30 T.A.C. §330.165(d)(4)(B).

<sup>10</sup> 30 T.A.C. §330.165(d)(1).

<sup>11</sup> 30 T.A.C. §330.165(d)(4).

polychlorinated biphenyl wastes that are subject to the disposal requirements of 40 C.F.R. Part 761.<sup>12</sup> Newpark also committed to conducting additional testing to further verify the suitability of the actual treated material to be used prior to it even being transported to the City's landfill. The remaining requirements in Subsections 330.165(d)(2), (3), and (4) for use of material as ADC are addressed as conditions in the TA.<sup>13</sup>

With its Request for TA submittal, the City followed the new TCEQ rule for use of material as ADC even though it contains concentrations of TPH levels in excess of 1,500 mg/kg, and met all applicable requirements therein. Therefore, the City has satisfied the applicable legal requirements for requesting temporary authorization to use Newpark's treated material as ADC.

## **VI. Conclusion**

The City and Newpark have proven that the use of Newpark's treated material as ADC is protective of human health and the environment. The material, consisting of treated, non-hazardous oil and gas waste, is not Class 1 waste. It is a recycled product with a beneficial reuse. The City and Newpark have adequately demonstrated that the use of the material as ADC satisfies all requirements set forth in 30 T.A.C. §330.165(d). Thus, the City has met the legal requirements for requesting and being issued a TA in this matter.

Based on the City's Request for TA, which included an abundance of historical and current analytical information concerning Newpark's treated material and the use of such material as ADC at landfills, the Executive Director issued the TA to the City pursuant to its discretion under 30 T.A.C. §330.165(d)(4)(B). Clearly, there is no reasonable basis under applicable law for overturning the TA issued to the City for the use of Newpark's treated material as ADC at its landfill.

The use of Newpark's treated material as ADC at landfills is a "win-win-win" situation for the municipal landfills, the oil and gas industry, and the environment. It has been proven that cities save hundreds of thousands of dollars by using Newpark's ADC. The cities do not have to excavate, haul and dispose of limited virgin soils for use as daily cover due to the availability of Newpark's ADC product. The reuse of Newpark's treated material as ADC benefits the oil and gas industry because it is the most environmentally protective option for managing non-hazardous oil and gas waste derived from oil and gas operations. If Newpark's recycled product were not available for use as ADC, the industry would have no choice but to land dispose of the oil and gas waste in accordance

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<sup>12</sup> 30 T.A.C. §330.165(d)(4)(A).

<sup>13</sup> In addition to other requirements imposed by the Executive Director, the TA requires the City to submit a status report concerning the ADC on a two-month basis during the term of the TA describing the effectiveness of the material, any problems that may have occurred, and any corrective action required as a result of such problems. The TA also limits use of Newpark's treated material as ADC to a 24-hour period after which either waste or daily cover must be placed, and requires Newpark to document that the material shipped to the City's landfill for use as ADC does not exceed the concentrations listed in Table 1 of 30 T.A.C. §335.521(a)(1). See 30 T.A.C. §330.165(d)(2), (4).

with RRC standards. Thus, the benefits to the environment afforded by the use of Newpark's product as ADC are clear.

WHEREFORE PREMISES CONSIDERED, Newpark Resources, Inc. respectfully requests that the Commissioners deny the Motion to Overturn the Temporary Authorization for Use of Newpark's Alternative Daily Cover Material at the Port Arthur Landfill filed by the Texas Campaign for the Environment and Community In-Power Development Association, Inc.

Respectfully submitted,



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**Attorneys for Newpark Resources, Inc.**

**CERTIFICATE OF SERVICE**

I hereby certify that on January 17, 2008, the original and eleven (11) true and correct copies of the foregoing document were filed with the Office of the Chief Clerk of the TCEQ, and a copy was duly served by hand delivery or certified mail, return receipt requested, on the following:

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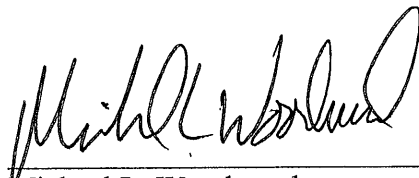
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Michael L. Woodward



**EXHIBIT A**

**TNRCC Letter dated November 17, 1993**

John Hall, Chairman  
Pam Reed, Commissioner  
Peggy Garner, Commissioner  
Anthony Grigsby, Executive Director



## TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

*Protecting Texas by Reducing and Preventing Pollution.*

November 17, 1993

Jerry Carey  
Newpark Environmental Services, Inc.  
4023 Ambassador Caffrey Parkway  
P.O. Box 31480  
Lafayette, LA 70593-1480

Subject: Solid Waste - Jefferson County  
City of Port Arthur Landfill - MSW Permit No. 1815  
Oil and Gas Wastes Processed by the Newpark Method for  
Use as Daily Cover Material

Dear Mr. Carey:

The Texas Natural Resource Conservation Commission (TNRCC) would like to thank you for your time and patience while we have been evaluating your processed oil-and-gas-waste product (the material) for use as a suitable alternative daily cover for the City of Port Arthur Landfill. We propose with this letter to address all of your requests and concerns regarding the regulatory status of the material.

After review of the regulations, we have determined that the material is exempt from the definition of solid waste because it results from activities associated with the exploration, development or production of oil or gas resources regulated by the Railroad Commission of Texas (RRCT) (see Title 30 Texas Administrative Code (TAC) §330.2, definition of solid waste). However, within the Memorandum of Understanding between the TNRCC and the RRCT and in your permit issued by the RRCT, the concurrence of the TNRCC is required for the final disposition of the material. Therefore, the material must be evaluated for use as an alternate daily cover material. As a result of the August 20, 1993 meeting and the November 2, 1993 meeting with you, members of your staff and your legal representative, the TNRCC has developed a management plan for the use of the above mentioned material.

COPY

Jerry Carey  
Page 2  
November 17, 1993

We will be notifying the City of Port Arthur of the following provisions for the use of this material.

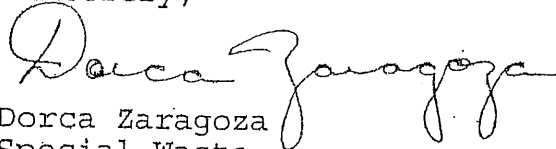
1. The City of Port Arthur must submit a request to the MSW Permit Section in order to use the material as an alternative daily cover material.
2. The material shall only be used for daily cover and only in lined cells of the landfill. A lined cell refers to an area which has, at a minimum, a constructed clay liner.
3. The material may be stockpiled for future use provided adequate measures are taken to control run-off/run-on of storm water. This may include but is not limited to berms or other drainage control devices.
4. Measures must be taken to control the airborne transport of dust generated by the stockpiling and moving of the material, since the agency has had complaints regarding dust associated with this material at the landfill.
5. Items 2 and 3 above must be addressed for existing stockpiled material.
6. The material is rotated so the oldest material is used first in order to minimize the time that the material is exposed to the elements.
7. The material entering the landfill must be free of liquids as determined using the Paint Filter Test (EPA Method 9095).

In order for the material to be evaluated for suitability for other uses, the agency must be provided information to compare the leachability of your product with other petroleum contaminated earthen materials. At this time, we are not prepared to allow the use of your product for any purposes other than daily cover in a lined area of a permitted landfill. Other landfills proposing to use this material as daily cover must submit a written request to the Permit Section of the TNRCC Municipal Solid Waste Division in order to use an alternate cover material. [See Title 30 TAC §330.133(c) pertaining to Alternative Material Daily Cover.]

Jerry Carey  
Page 3  
November 17, 1993

If you have questions regarding the permit stipulations for use of your material, please contact Jerry Garnett with TNRCC MSW Permits at (512) 908-6673. If you have any other questions regarding this letter, you may contact Julie Westphal of my staff at (512) 908-6832.

Sincerely,



Dorca Zaragoza  
Special Waste  
Waste Evaluation Section  
Industrial & Hazardous Waste Division

DZ:jw

cc: Phil Clark, Newpark Environmental  
Cynthia Smiley, Jones, Day, Reavis & Pougue  
Windle Taylor, RRCT, NPDES Program Manager  
Taylor Shelton, City of Port Arthur  
Grace Montgomery-Faulkner, TNRCC I&HW-Waste Evaluation  
Mark Vickery, TNRCC MSW-Compliance and Enforcement  
Jerry Garnett, TNRCC MSW-Permits  
Steve Shepherd, TNRCC Legal Services Division  
Craig Flemming, TNRCC Region 10 - Beaumont  
Julie Westphal, TNRCC Special Waste  
Special Waste File (NEWPARK.LTR)